Opening Stmnts

IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 00-03153 CA 32

SUZETTE A. JANOFF,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
R.J. REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and
BROWN & WILLIAMSON TOBACCO CORP.,
Individually and as Successor
to THE AMERICAN TOBACCO COMPANY,

Defendants.

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VOLUME 5

PROCEEDINGS BEFORE THE
HONORABLE LESLIE B. ROTHENBERG
on Friday, August 23, 2002
1:00 p.m. to 5:30 p.m.

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P R O C E E D I N G S

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THE COURT: Thank you, you may be seated. We're still waiting for one juror, Mr. Ramos has not yet showed up. We tried calling his home, doesn't have a business number and it's an answering machine.

MR. REILLY: Your Honor, I have two small matters before we get started.

THE COURT: Yes.

MR. REILLY: Over the lunch hour Plaintiff's counsel served a subpoena on my corporate representative, who I introduced yesterday.

Now, Mr. Lindon -- Tim Lindon is here as an observer, is not listed on anyone's witness list. This is quite frankly --

THE COURT: A surprise.

MR. REILLY: Not only a surprise, but this is silly.

THE COURT: What's going on here?

MR. HUNTER: They made a big deal about introducing these people. And I think I should have a right to call the Defendant as a witness in the case.

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THE COURT: Have you listed him as a witness?

MR. HUNTER: I have to look and see if I did or not. But since they made a big point of that I think they were trying to infer to the jury that these people would be here, they would be available. And I thought I should serve him with a subpoena in case I want to call him as a witness. I don't think anything needs to be done with that other than to let the Court know that I've done that.

THE COURT: If he's not listed as a witness it seems inappropriate to serve him with a subpoena for trial. He was here as an observer, has a right to be here.

MR. MOLONY: I have the list. They're not here individually nor generically.

MR. REILLY: I would ask that the subpoena be quashed, Your Honor.

THE COURT: Do you want to check your list?

MR. HUNTER: I'll accept representation that the list does not include the parties. Are you making that representation?

MR. MOLONY: Here it is.

THE COURT: Just check it for me.

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MR. MOLONY: I'll check it. I have been told that. I will check it.

MR. REILLY: Regardless, even if it did --

THE COURT: If they're listed it's a different story. If they're not listed, then I will certainly grant your motion to quash.

MR. REILLY: Your Honor, there is a reference to a representative of the Defendants. However, I still object because there is no -- Lindon is a lawyer. When I started this off I introduced him and said not that he would be here throughout the trial, but instead that he wouldn't be here throughout the trial.

THE COURT: You said they would be coming in and out.

MR. REILLY: I made no representation that he's involved in the facts of this case. This is just a stunt. I don't want Mr. Hunter to be able to call him and simply embarrass him on the stand because he doesn't know anything about this case because he came down to observe the trial.

MR. HUNTER: I will call him as a representative of the Defendant because that's how he's been represented to the jury. I have a

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right to call the Defendant. I've done this before. If he knows nothing about the case, he says, I'm merely an attorney from a law firm or I'm in-house and they've asked me to come here, I'll say no further questions. I always do it when I have a case against a corporate Defendant. I always call the corporate representative and I say, what is your name? What do you do? Do you have any knowledge concerning this case? And if they say no, then that's all there is to it.

MR. REILLY: What is the probative value of that, Your Honor? None. All it is is prejudicial.

THE COURT: What would the probative value be if he has no relevant evidence or testimony to give in the case?

MR. HUNTER: Can we go on with opening statement? And I promise I won't call him today or refer to him in my opening.

THE COURT: I would suggest that at any point if you wish to call him, you bring it up outside the presence of the jury before we determine.

MR. REILLY: I've showed them my

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demonstratives. They've shown me theirs. I have no objection to all except one, one demonstrative that Mr. Hunter plans on using is one that makes reference to an action plan to discredit the Surgeon General and focus on environment not ETS. This reference to an action plan has not been ruled on by Your Honor yet as to whether or not it's going to be in this case or not. It would be like me trying to pull out an exhibit and saying I'm going to use this as an exhibit. It hasn't been ruled on yet.

If there are things that have been admitted by both parties, I have no problem. If they want to pull something out of the employment records, I have no problem.

MR. HUNTER: I'm showing the Court the exhibit that he objects to. Quite simply, Your Honor, I'm going to tell the jury that these Defendants developed an action plan concerning smoking on airlines, that they weren't merely manufacturers and sellers of tobacco in North Carolina. That they developed an affirmative plan of action concerning smoking on airlines.

THE COURT: And you intend to do that

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orally or through some written documentation.

MR. HUNTER: Well, I have written documentation to back up my statements to this jury.

THE COURT: For the record, the exhibit, I'm not even sure you could call it an exhibit, it's simply an 8 by 10 piece of paper that says smoking on airline, action plan, discredit the Surgeon General, focus cabin environment not ETS.

Is this to highlight your testimony or is this a document that you intend to use?

MR. HUNTER: It's to highlight my testimony.

THE COURT: Then it's overruled. You can highlight your arguments in any way that you wish. I didn't know if this was going to be a document that came out of something that they were intending to produce or what.

MR. HUNTER: No, it's not.

I'm going to ask for the Court's permission to show this from the television screen. And you can't see it; is that permissible?

THE COURT: That's fine.

I've also been told you haven't marked any

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exhibits; is that correct?

MR. HUNTER: They will be being marked, where -- Lisa.

MR. HUNTER: We want to try to start today, but the clerk sits right in the middle of the courtroom, otherwise they would have been marked.

THE COURT: Any exhibits that you're going to be introducing during today's testimony?

MR. HUNTER: None.

THE COURT: After today I want you to mark all the exhibits.

MR. WILLIAMS: Your Honor, I have the deposition of Mr. Berdi.

THE COURT: You do not have the objections?

MR. KODSI: I have Dr. Stroschein, we talked about earlier.

I'll represent to the court, I was highlighting with very quick speed, I think I got them all, double-check it. And these are the objections for Berdi, Your Honor.

THE COURT: I do have the rulings on some of the others' testimony, while we're waiting for the juror I'll give that to you. On Hugh Fulton.

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How many copies do you all want?

MR. REILLY: We just need one.

THE COURT: And for the plaintiff on Mr. Fulton? Here are the rulings. Two copies enough? I have the rulings on Dr. Lumry for Defendants, for Plaintiffs.

And then as to Carr Smith I have that as well.

So that leaves Stroschein, which I'm not going to be able to do until the weekend. And Houston, which I have not done. Berdi, which I now have and will do over the weekend. There are going to be others as well, correct?

MR. WILLIAMS: It also leaves, judge, the objections that I had to the cross examination by Mr. Reilly, I believe he agreed on two of them. I highlighted in yellow and I provided the Court --

THE COURT: On which witness?

MR. WILLIAMS: Dr. Lumry. It was on Mr. Reilly's cross examination of Mr. Lumry.

THE COURT: Did I miss it or is it included in there?

MR. WILLIAMS: The cross examination by Mr. Reilly, judge.

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THE COURT: That was in the one where you also -- it was on the same sheet with the Stroschein?

MR. WILLIAMS: Yes, judge.

THE COURT: Yes, I did look at it. Tell me which -- I don't know if I brought the whole. I have the deposition here. Tell me which lines, please.

MR. WILLIAMS: Judge, I'm sorry, I don't have them right now with me. There are only four.

THE COURT: I marked it on my copy in chambers.

MR. WILLIAMS: There are only about four of them and Mr. Reilly agreed that two of his --

THE COURT: Correct, I can't remember what I ruled on the other two.

MR. KODSI: Your Honor, do you have the Carr Smith ones in front of you? I have a clarification, the last line are counterdesignations and you have sustained.

THE COURT: You're both agreeing?

MR. KODSI: I asked Mr. Williams and Mr. Hunter. The one that you said objection sustained is just where the witness is saying,

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has he ever been deposed before and it's his first time.

THE COURT: Any problem with that?

MR. HUNTER: You have to answer for me, judge, I'm sorry, I didn't hear.

MR. KODSI: When you're deposing Carr Smith you're asking, has he ever given a deposition before. And he says, no, this is my first time, first time at trial.

MR. HUNTER: You want that in?

MR. KODSI: Yes. So the Court is ruling that both of the Defendant's counterdesignation can come in?

THE COURT: Yes, I will.

You're going to need to make that correction, Mr. Hunter.

You see where we're referring to?

Do you have that on Carr Smith so I can make the correction for you? If you bring it up here, I can make the correction for you.

MR. UPSHAW: Judge, you asked me for this yesterday. I want to get it out of the way, so you have it. I've given a copy to counsel for Plaintiff.

I have nothing else for you.

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THE COURT: Today.

MR. UPSHAW: Today. But I'm off the hook on what you asked me for, hopefully.

MR. MOLONY: Your Honor, the only other witness is the Carol Wurmlinger, who Mr. Williams tells me that he would expect to read from the transcript next Wednesday. He has not given us the designations yet. And apparently we'll have those on Monday. I just want to apprise the Court of that and we can't give our counters until we know that.

THE COURT: Wurmlinger.

MR. MOLONY: W-U-R-M-L-I-N-G-E-R.

THE COURT: Plaintiff is giving defense designations on Monday.

MR. WILLIAMS: I didn't ask her any questions, so it's just his questions that I'm going to read.

MR. MOLONY: Mr. Williams, is there any other witness that you intend to -- I can't think of any -- but I thought for closure sake. Is there any other that we're going to read?

MR. WILLIAMS: I can't think of any.

THE COURT: I have the rulings, the Plaintiff's objections to William Lumry's

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testimony. I'll just give it to you orally.

MR. WILLIAMS: That's fine.

THE COURT: The first objection was page 17, lines 14 through 20. That's overruled.

Item number 3, which is page 24, lines 2 through 5 is sustained.

Fourth item is page 27, line 11 to page 28, line 13, overruled.

MR. HUNTER: Judge, I think maybe we ought to wait another however many minutes. We're going to finish doing today whatever we're going to do today anyway.

THE COURT: We'll give it like another 15 minutes.

Everything that can go wrong will.

(A recess was taken.)

THE COURT: Thank you, you can be seated.

It's 10 minutes to 2:00. We're due to begin at 1:00. What's your position, Plaintiff?

MR. HUNTER: We're ready to go, judge.

THE COURT: Defense?

MR. UPSHAW: Judge, I don't think you can go forward. You don't have any alternates. You lost one.

THE COURT: You can go forward.

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MR. UPSHAW: You asked our position. I know you can. This is your courtroom. We are objecting to going forward without any alternates. In fact, if you intend to sit this particular alternate we would object, based upon our earlier objections, based upon how this alternate was selected.

THE COURT: What do you propose we do?

MR. UPSHAW: Propose we seat another panel.

THE COURT: That's overruled.

We have six jurors. There's no reason why we can't attempt to proceed with six jurors. It's certainly not my preference.

It's unbelievable. We've called his home, he's not there. He hasn't called us. He was sworn, in he knows he's a juror. Could have made a mistake said 1:30. Could be in an automobile accident.

MR. HUNTER: Your Honor, I think it's a close call. We certainly, in light of how this case has shortened down, we can pick another alternate on Monday morning and get cranked up and go.

THE COURT: No. I'm not doing that. If we're going to go, we're going to go with the

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six that we have. You had an option of having two alternates.

That was based -- based upon both the Plaintiffs and the Defendants in this case that we only have one alternate.

MR. WEINSTEIN: It might be a good idea, if I might say this, to talk to the jury that we now have six and emphasize how important it is because we don't have an alternate and that somebody might be ill.

THE COURT: I understand. I do that anyway.

MR. MOLONY: Could I make a suggestion? As the Court points out, there may be a perfectly legitimate reason that this gentleman cannot be reached and for his not being here. Given the fact that the case has shrunk in terms of its duration, notwithstanding the problems, withholding these people up and everyone who are participating here, I'd like to suggest that we do the openings on Monday, apologize to this panel, find this young man, perhaps he is in the hospital, perhaps not. That way we would not be in the peril that we have experienced in other cases where if one more doesn't show up, then we

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don't -- there's no choice if the parties don't agree to five.

THE COURT: That's a possible solution.

MR. HUNTER: That's all right with us.

THE COURT: My real concern is Ms. Reiter, too. Because every day we delay this, the more difficult it is for her. She missed yesterday; she missed today. Really didn't get anywhere for the last two days as far as she's concerned. Which means we're certainly not going to get done. I may consider doing that.

He may have a legitimate reason. On the other hand, if he doesn't have a legitimate reason and simply didn't follow the instructions. I'm probably going to strike him on Monday.

MR. HUNTER: Maybe we ought to go ahead. It seems to me like this, if he does have a legitimate reason, he's probably not going to be able to serve.

THE COURT: If he does have a legitimate reason and he has the weekend, he'll be fine. But if he doesn't he'll incur my wrath. Although over the weekend I'll have less wrath.

MR. MOLONY: Being that the Court has

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indicated that it is not decided what you would do with this individual, regardless of his explanation, it would seem to me, given the time that we have that perhaps we should proceed on Monday so that we don't run this risk that we're apparently courting at this point.

THE COURT: And Plaintiff does not object to that procedure --

THE BAILIFF: Judge, he's on his way. Just got a call from Corey.

(A discussion was held off the record.)

THE COURT: He said the tower was down, whatever that means, and so his alarm didn't go off and he just woke up from the phone call. Said he could be here in about 20 minutes. He can take the Metrorail. Shall we wait for him or start on Monday?

MR. REILLY: Why don't we start on Monday? I hate to delay anything.

THE COURT: We could do at least openings. That takes care of two and a half hours worth this afternoon. I don't care. I'll do either.

MR. REILLY: My only fear is it isn't going to be 20 minutes, it's going to be an hour.

THE COURT: My guess is at least a half

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hour. What's your position?

MR. HUNTER: I'm neutral. What do you want to do?

MR. REILLY: That's just a suggestion. I'm happy to go today.

THE COURT: I'll do either. So you guys decide.

MR. HUNTER: We can work today.

THE COURT: I feel a little bad because we did bring the other five jurors back and they've been waiting since 1:00.

THE COURT: Unless you want me to bring the jury in and give them an option.

MR. UPSHAW: They're the ones that have been waiting; that's true.

(Jury enters courtroom.)

THE COURT: Thank you and welcome back. I apologize you've been waiting so long. We've been waiting for Mr. Ramos. As you know we've just now contacted him on the phone. He can be here in about a half hour. So we decided to leave this up to you because being it's your time today. We can either wait the half hour or so it's going to take him and at least do opening statements today or if you prefer to

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resume on Monday and go home today it's up to you. It's really whether you'd like to wait for him or start first thing Monday morning. If you'd like to discuss it with yourselves.

(A discussion was held off the record.)

JUROR LE NOIR: We want to start today.

THE COURT: Everybody agrees?

JUROR LE NOIR: Yes.

THE COURT: So why don't we take -- he says 20 minutes, but my guess is 30. Why don't we take a half hour recess and hopefully we can begin at 2:30. And I apologize to you.

(Jury exits courtroom.)

THE COURT: We'll be in recess until 2:30.

(A recess was taken at 2:08 until 2:50.)

MR. HUNTER: We can take up one issue while we're waiting.

We have made a decision that we are not going to call Dr. Casiano; and therefore, would like to announce that to the Defendant so they don't mention anything about him, similar to the motion that they filed about their doctor, Stammberger.

MR. REILLY: Your Honor, it's a different situation, though. And there's case law right

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on it.

Dr. Stammberger didn't examine anybody and Dr. Casiano did. And the results of Dr. Casiano's examination have been disseminated to both of our experts and they have reviewed them and they've given opinions regarding his examination and the results of his examination to these counsel in the deposition. They've asked him, do you agree with Dr. Casiano on this, that and the other?

There's case law that says when you pull somebody who has actually done an examination, that you then aren't in the same position as somebody who simply had an expert you didn't list and then you withdrew them.

So while I didn't plan on saying very much about Dr. Casiano, he did do an examination and the results of his examination are known. And the fact that they're not calling him is the fact that they're not calling him.

MR. HUNTER: What I'm asking is that he not tell the jury they sent her to Dr. Casiano and Dr. Casiano says this and that.

If they want to say to the jury, Dr. Casiano says something, that's fine, because

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that's -- they're going to either try to prove that or not. And I don't know if they're going to be able to prove it. But what they can't say is that we retained him and we're not going to call him if we're not going to call him and they're not --

MR. REILLY: That's exactly what the case law says I can do.

THE COURT: Let me see that. Because the criminal case law prohibits either side.

MR. REILLY: It rarely comes up in this context, but here's the case. It usually comes up the other way, where the Defendant has done an independent medical examination and then they don't call the doctor and then the Plaintiff wants to say, hey, they had an examination done and they didn't call the doctor. But that's exactly what happened here. And the case that I'm referring to, it's a First DCA case called Linehan versus BE Everett BEA Dixie Ambulance Service.

If I can hand it up to Your Honor.

MR. WEINSTEIN: Can we get a copy of it?

MR. REILLY: I didn't know you guys were going to bring it up.

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THE COURT: Do you have anything more current and maybe not First District? This is a 1976 case that I have quite a bit of case law, but as I said it's all on criminal cases that neither side can comment on the other side's failure to call a witness that was equally accessible to both.

MR. REILLY: But Dr. Casiano isn't equally --

THE COURT: He was -- you could have brought him before the jury. It has to be somebody that based upon a special relationship that you have with that witness that the other side would not know how to contact him except if you were to call him.

MR. REILLY: There's the case law, Your Honor.

THE COURT: Until I see some case law, I'm a little uncomfortable relying on a 1976 case out of the First District in light of my knowledge of the other case law on this issue.

MR. WEINSTEIN: That's my understanding of what you just said, judge. I think they even withdrew an old instruction that used to say that.

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MR. HUNTER: Well, the case law that I'm aware of has to do with experts.

MR. REILLY: Your Honor, I won't say anything about them having Dr. Casiano examine the Plaintiff on opening.

THE COURT: And I'll reserve on it.

THE BAILIFF: I was right. He got here at five of.

THE COURT: The jurors have indicated to Gary that they need to be out of here by 5:30. It's now five to 3:00. It looks close.

MR. REILLY: Mine is an hour and a half long.

THE COURT: Yours is an hour?

MR. WILLIAMS: Judge, we're going to split it up.

THE COURT: You anticipate about an hour?

MR. WILLIAMS: We'll hurry up so they can get out of here.

MR. HUNTER: Well, it certainly won't be an hour and a half. If it was an hour and --

THE COURT: Feel free to take as much time as you want, but what time --

THE BAILIFF: The problem is one of the jurors is in a lot that closes at 5:30.

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THE COURT: I thought they close at 6:00. Why don't you check on that because maybe she should just move her car very quickly.

MR. KODSI: Your Honor, while we're waiting, I wanted to get a point of clarification. I know you ruled earlier with respect to a demonstrative exhibit with respect to action plan. I wanted to make sure he wasn't going to show any documents to the jury.

THE COURT: That was my understanding.

MR. KODSI: And then I want to make the objection that he shouldn't be able to refer to it at all. I know that's been handled, just to renew that for the record.

THE COURT: All right.

(Jury enters courtroom.)

THE COURT: Thank you. You may be seated. For the record, note the presence of counsel for the Plaintiff, counsel for the Defendants and the jurors are now present as well.

As you can see, when one juror is not on time, it not only delays the entire proceedings, but it also negatively impacts upon all your fellow jurors. I'm going to ask that you all are very careful about being here on time. We

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will do our best not to waist your time, but we have a lot of work to do and want to get it done as quickly as possible.

Members of the jury, you've been selected and sworn as the jury to try this case. As I've already explained to you, this is a civil case involving a disputed claim or claims between the parties.

By your verdicts you will decide the disputed issues of fact. I will decide the questions of law that arise during the trial. And before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdicts. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus the function of the jury and the function of the judge are well defined and they do not overlap. That this is one of the fundamental principles of our system of justice. Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence

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in the case. And you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I say or do except for my specific instructions to you.

Before we proceed, I think it will be helpful for you to understand how the trial is to be conducted. In a few moments the attorneys for the parties will have an opportunity to make opening statements in which they may explain to you the issues in this case and summarize the facts that they expect the evidence will show.

Following the opening statements witnesses will be called to testify under oath. They will be examined and cross examined by the attorneys. Documents and other exhibits will also be introduced during the course of the trial. After all of the evidence has been received, attorneys will again have an opportunity to address you and to make their final arguments.

The statements that attorneys make to you and the arguments that they later will make to you are not to be considered by you as evidence in this case or as to your instructions on the law.

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Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence and the applicable law so that you should give them your close attention.

Following the final arguments I will instruct you on the laws that apply to this case. You should give careful attention to the testimony and other evidence as it is received and presented for your consideration. But you should not form or express any opinion about the case until you have heard all of the evidence, the arguments of the lawyers and my instructions on the law.

In other words, you should not form or express any opinion about the case until you have retired to the jury room to consider your verdict after hearing all of these matters. The case must be tried or heard by you only on the evidence presented during the trial in your presence and in the presence of the attorneys and myself.

You must not conduct any investigation on your own. Accordingly, you must not visit any of the places described in the evidence or the

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scene of the occurrence that is the subject of the trial unless I direct you to view the scene.

Also you must avoid reading newspaper headlines and articles relating to this case or to this trial. You must also avoid seeing or hearing television or radio comments or accounts of this trial while it is in progress.

The attorneys are trained in the rules of evidence and trial procedure. And it is their duty to make all objections they feel is proper. When a lawyer makes an objection I will either overrule or sustain the objection. If I overrule the objection, the witness will be allowed to answer the question. When I sustain or uphold an objection, the witness cannot answer the question.

If I sustain an objection, you must not speculate on what might have happened or what the witness might have said had I permitted the witness to answer that question.

You should not draw any inferences from the question itself.

During the trial it may be necessary for me to confer with the attorneys out of your hearing talking about matters of law and other matters

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that require consideration by me alone. It is impossible for me to predict when these conferences may be required or how long they may take. When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of this case.

During the trial we will be taking recesses. During these recesses you shall not discuss this case among yourselves or with anyone else nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses or any of the parties about anything until your deliberations are concluded. In this way any appearance of something improper can be avoided. If during a recess you see one of the attorneys and he or she does not speak to you or even seem to pay attention to you, please understand that the attorney is not being discourteous, but is only avoiding the appearance of any improper contact with you. If anyone tries to say anything to you in your presence about this case, tell that person that you are on the jury trying this case and ask

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that person to stop. If he or she persists, leave at once and immediately report this to the bailiff, who will then advise that matter to me.

At this time the attorneys for the parties will have an opportunity to make their opening statements in which they may explain to you the issues of this case and give you a summary of the facts they expect that the evidence will show.

Before we begin, I'm going to have Gary pass out a pad of paper and a pen to each of you in case you wish to take notes. Don't feel that you are obligated to do so. If you'll simply write your name on the back of the pad of paper, we will be able to hand them out to you easily each morning before we begin. At the end of the day we'll be collecting them and sealing them in an envelope, nobody will review your notes. Gary will have exclusive control of them and keep them in a sealed envelope and return them to you each day.

Thank you, Mr. Hunter you may begin.

MR. HUNTER: May it please the Court, counsel. My name is Steve Hunter. I represent Suzette Janoff.

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Opening statement is the part of the trial where lawyers tell you what we expect that the evidence will show. I saw how quickly you all agreed on hearing opening statements, so it's the first time I've ever talked to a unanimous jury.

I'll divide my time up with Mr. Williams. We don't get any more time than the defense does, so we'll divide it so I can touch on some areas and he can touch on others.

The case really involves a little bit of history. And that's what the evidence will show. The real history of this case starts out about 1962.

One of the first company witnesses, and I mean one of the first witnesses from the Defendants you will see by videotape. He was with Brown & Williamson -- I'm sorry with RJ Reynolds. And in his deposition I was asking him a question, I asked the Defendants to produce to me in this case the person that they selected as having the most knowledge concerning environmental tobacco smoke and the health of healthy nonsmokers on airplanes. Who at your company has the most knowledge concerning that

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subject? They produced this gentleman to me. And their position is that at this day and age, in the year 2002, their position is that environmental tobacco smoke or secondhand smoke or what the Surgeon General called involuntary smoking, because if you're in an airline cabin and that's your profession, that's the career you've chosen and other people are smoking, you are involuntarily smoking because you have to breathe.

This argument about this isn't an issue of choice. We all have to breathe. So it's called involuntary smoking or environmental tobacco smoke or secondhand smoke. But the tobacco industry's position, make no mistake, is that it does not cause disease in healthy nonsmokers.

Now, you have been instructed by the Court to presume as you begin the deliberations in this case -- and I had the Court Reporter's transcribe exactly what the court has instructed you -- secondhand smoke or what may be referred to as environmental tobacco smoke can cause chronic sinusitis. And the Defendants, therefore, have the burden of proving that secondhand smoke cannot cause chronic sinusitis.

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If they cannot convince you by the greater weight of the evidence, then you must conclude that it does.

They deny that it causes any disease.

So I took the deposition of RJ Reynolds. I said, bring me the man that knows the most about this subject. And they produce him. And I said, do you deny that it causes disease in healthy human beings? He said, yes. I said, you disagree with the Surgeon General? He said, yes, I disagree with the Surgeon General. I said, do you disagree with the National Academy of Sciences? He said, yes, we disagree with that. I said, how about the American Lung Association; do you disagree with them? He said, yes.

The tobacco industry disagrees with all these people.

So I showed him a document that was prepared in 1962. And in that document was written by a high -- probably their highest level scientist in 1962 and it said, you know, people think that we sell cigarettes, but what we really sell is smoke. And for the past 20 years our smoke has been incriminating by all of

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the health studies. That was a document in their files in 1962, talking about 20 years before that. So they've known since 1942 that what they sell is smoke and smoke is incriminating from a health standpoint. And yet they won't admit it in this courtroom here today.

Now, in 1962, Suzette was 5 years old. And later on she began a career in 1983. And she was excited to get it, because it was a good career for a woman of her age and her position and she was excited. She was happy. It was important to her. That was a good career. And she was happy and looked forward to a future and was -- it was a good job to be a flight attendant.

In about that same time, 1983, the tobacco industry realized, because of studies that had been produced, that there was a study done in Japan by a Japanese scientist and he had learned that Japanese women who were married to men who smoked got more lung cancer than Japanese women who were married to men who didn't smoke.

And at that point in time, that was in 1981, the public generally hadn't given a lot of

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thought to environmental tobacco smoke or secondhand smoke. But that study hit the tobacco industry like a right cross. And they engaged in an action plan that they're going to carry right into this courtroom. Because to tobacco, if the public began to believe that environmental tobacco smoke could cause disease in healthy nonsmokers, it was a financial proposition, nothing more, nothing less.

So they engaged in the action plan.

They engaged in a plan that was pretty simple. They said, let's create doubt in the minds of the public. Let's pretend that a genuine scientific controversy exists. Let's inundate the media with information. Let's hire scientists. Let's spend as much money as we have to do. Philip Morris spent 64 million dollars in three years to misinform the public. Let's create a controversy where none exists. And let's discredit the Surgeon General.

Now, Monday morning you will see the Surgeon General, Julius Richmond, testify in this case. And you will hear from his own lips what the tobacco industry did when he tried to bring the word to the American public about

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environmental tobacco smoke and smoking and health issues.

Now, Julius Richmond is truly a modern-day hero. He is one of the world's -- he's one of this century's great men. He started the Head Start Program for disadvantaged children. He was the originator of Head Start. He was appointed as the Surgeon General. He did not campaign for it. He was in charge of the Surgeon General's Report in 1979. And what he says is, and listen carefully, he says that they had done a lot of work to have the Surgeon General's Report be issued. It had not been released to anybody. It was a very -- it was a monumental report because it was reviewing 15 years of research. And the Public Health Service, the Surgeon General's charge is to protect the American public health. He has no interest in this case. He has no bias. He has no reason to testify anything other than to the Surgeon General is in charge of promoting the public health of American citizens. And his report was due and he said somehow tobacco -- hadn't been released -- got hold of his report and they called a press conference the day

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before the report was to be issued and they said, ah, this is nothing new. It's wrong. It's old stuff. There's nothing here. It's not important.

And they carried it -- he said he thought it was unethical. And he says that in his own words.

So when the report came out, they had already -- the tobacco industry and all their public relations and everything had already gotten -- they had trumped them and they said, it's nothing new. Don't listen to it. It's not new science. It's old stuff.

When you got to smoking on airlines, part of the action plan, and the reason I go into this at some length is because, and I digress here.

This is the reason I go into this at some length. As the judge instructed you, you're to presume as you begin to deliberate that secondhand smoke can cause sinus disease.

And then your next question is: Does Suzette Janoff -- was it a legal cause? Was it a cause of her sinus disease? And that's your next decision.

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Now, and the judge will instruct you on this, that it need not be the only cause, that it needs to be a substantial contributing cause. Her exposure for 10 years or longer, it was longer than that. You'll hear Mr. Williams will go through exactly, was her exposure a substantial contributing cause? Because there are many causes to sinus disease in addition to secondhand smoke. Secondhand smoke is an irritant. As they knew, they knew, they didn't tell anybody else this. They knew in 1962 smoke has hydrogen cyanide in it. I don't know if I spelled that right. It has arsenic in it. It has ammonia, has carbon monoxide.

Arsenic is what they used to put in rat poisoning and bug poisoning.

Hydrogen cyanide is what they use to put in gas chambers.

Carbon monoxide, if people want to kill themselves, they put the car exhaust into their car. It's poison.

It has 4,000 -- when they wrote in 1962 they had only figured out there were 400 poisons. Now they know there's 4,000 poisons in tobacco smoke. But see, tobacco companies

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didn't tell anybody this. In fact, Dr. Richmond -- Dr. Richmond will say when asked in a courtroom such as this, did tobacco cooperate with you? He says, no, you know, they wouldn't even tell us what was in it.

But we all know now there's 400,000 (sic) irritants in it. And it's an irritant, that's why it causes these diseases, because it irritates your body until other things, like viruses or other things cause you to get sick. Your body is designed to function in the real world, but not in a world -- not a closed world with tobacco smoke. It overwhelms our ability and that's when we begin to get sick.

But the reason that I digress is because when you answer this question you say, we find it's a contributing cause of the illness, the defense then comes in, and the defense is, well, it's her fault. Because she should have given up her career. We want to sell cigarettes and we have the right to sell them and she's got to quit her job because we want to sell cigarettes. And if it conflicts with her, then it's her business to get out. And that's the argument about, you know, personal choice.

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And they make the same argument in smokers cases, if it's a smoker they say, well --

MR. UPSHAW: Objection, Your Honor.

THE COURT: Sustained.

MR. HUNTER: But that's their defense, well, it's her fault. And if it's not her fault, it's the airline's fault because the airlines allowed people to smoke on the planes or something about their ventilation system. See, tobacco never accepts personal responsibility. There's no corporate responsibility with tobacco. It's always something else.

So part of their action plan, which they invented in the mid '80s, is going to play out before you in this courtroom.

MR. UPSHAW: Objection, Your Honor. Improper opening --

MR. HUNTER: They bring --

THE COURT: Overruled.

MR. HUNTER: The evidence that they'll bring, they thought about this, they had a meeting. There's a document. They said in the mid '80s, we're going to develop an action plan to deal with this, smoking on airlines. They

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didn't tell anybody this. They didn't tell anybody what they were up to. And the action plan was to focus on cabin environment not environmental tobacco smoke.

And I submit to you that the lawyers for the tobacco in this case will --

MR. UPSHAW: Objection, Your Honor. This is obviously argument.

MR. HUNTER: -- will offer --

MR. UPSHAW: Can we have a sidebar if necessary? I don't want to make speaking objections.

MR. HUNTER: Your Honor, I can rephrase the statement.

THE COURT: Please do.

MR. HUNTER: The evidence that they bring to you and their defense will be, well, it's exactly this, focus on the cabin environment. Say, well, you know, there's a lot of mold up there. And there's dry air. And there's fungus up there. And there's probably ozone. And you know, there's bacteria because there are a lot of people on there and they cough on you and the flight attendants have to -- there's dust. And she's probably got allergies.

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Well, the airlines, you know, they probably didn't run the ventilation enough. And the pillows probably have germs on them. Oh, pressurization, pressurized up there, that's it. See, it's the pillows and it's the pressurized and it's the allergies. People are allergic. There's ozone. It's the bacteria. It's the mold. It's the dry air. It's the airline's fault. It's just anything but tobacco. Anything. Look here, don't look here.

I submit to you that's what the evidence presented to you in this courtroom will be for the next -- for the defense of this case. But that the greater weight of the evidence will be that tobacco is a contributing cause and it may operate in connection with these, one or more, in this case.

Dr. David Burns will be the next videotape, won't be the next videotape. You'll see the videotape of the RJ Reynolds corporate man, the Surgeon General. Dr. David Burns will be one of the next. Dr. David Burns will also testify concerning what tobacco did to dissipate their report. He was the senior scientific editor of the report on involuntary smoking in 1986. And

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they go after him with a vengeance. And he says that secondhand smoke, which we all know is worse than direct smoke, it has no filter on it. And I asked the fellow from RJ Reynolds that and he said, yeah, it has more bad things in it, but it's diluted. That's their defense.

Dr. Burns, who wrote -- who was a senior scientific editor of every Surgeon General's Report, but especially that in 1986 on involuntary smoking said that environmental tobacco smoke, it makes allergies worse. It aggravates people that have allergies, causes sinus disease in flight attendants. And you know how long he said it takes? It takes about a year, in his opinion, of exposure. Because a flight attendant is exposed to environmental tobacco smoke in ways that nobody else in an ordinary occupation is, because they can't open a window; they can't get away from it. There's a lot of people smoking. Some of these planes have a hundred or more smokers. A hundred or more people will smoke at the same moment. Because smokers a lot of times are anxious, as we all are.

I don't know if anybody here on this jury

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can fly on a plane in total relaxation. I've never been one of them. But often times people who smoke on a plane will, when they can, when the light goes on or off, whatever it is. There's an intense exposure with flight attendants to this.

I'll turn the floor over to my partner, Mr. Williams.

But I have to comment again about the defense in the case, because what we've called are the Surgeon Generals, people who wrote the report and the treating physician. We'll call the treating physician of Suzette.

What tobacco has done is they hire these people and pay fabulous sums of money, they have doctors who never examined her, but they're going to say, well -- they send them the literature that they want, all the stuff that they have, and they send them to these doctors and they say, doctor, do you have an opinion? And they pay them tremendous sums of money. And that's what you'll hear is their hired witnesses. Our witnesses are the Surgeon General, the editor of the report and the treating doctor. And those are the witnesses

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that you'll hear from on the medical issues.

But on the defense -- the evidence in this case will be that this is not a -- this involves corporate responsibility in this fashion. This is not a company that sits up there in North Carolina and makes cigarettes and sells them and nothing more. This is an industry --

MR. UPSHAW: Objection, Your Honor, this is not comment on the evidence.

MR. HUNTER: Testimony in this case will be --

THE COURT: Overruled.

MR. HUNTER: -- that this industry, when Northwest Airlines voluntarily banned smoking, this tobacco industry attacked the airline industry viciously. Financially. And they tried to make it hurt. When Northwest Airlines voluntarily allowed nonsmoking flights, tobacco took out, filed a press release and wrote millions of letters against Northwest Airlines. They took out ads. They took out a press release and they said, well, Northwest Airlines has a bad safety record. Because they were trying to make sure that no one, no other airline would do what Northwest did. And that's

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why I mention, because you're going to have to compare, if you find that the airlines need to be -- that the conduct of the airlines needs to be evaluated, then you need to compare that with the conduct, contemporaneously, of the tobacco industry. And this industry understood that if the airlines banned smoking, it meant dollars to them.

Philip Morris did a study and found out that if smokers reduced smoking three to five cigarettes, it cost them a billion dollars a year. And they went after the airlines with a vengeance. And they tried to make an example out of Northwest Airlines, so that no other airline would dare do what Northwest did.

And they did the same thing with Eastern. And they did the same thing with Delta. And they wielded their financial might like a sword.

So that's evidence that I ask you to consider when -- if you get to the point where you're weighing the responsibility from a corporate standpoint of tobacco, who's tried to hide all these things for these years against the airlines that are in the business to transport people from one place to another.

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They don't ever have campaigns against tobacco. They stick to their business. But this is not a business that sticks to their business. This is a business that goes after other businesses.

So I will turn the floor over to my partner and I ask you for your -- I want to thank you for your close attention.

THE COURT: Thank you, Mr. Hunter.

Mr. Williams.

MR. WILLIAMS: May it please the Court, counsel.

Good afternoon. As Steve told you, or Mr. Hunter explained to you, this is the part where we explain to you that as lawyers what we believe the evidence in the case is going to show. He's explained to you what part of the evidence are going to show. Now it's my job, and I'm going to be as brief as I can so you all can finally get out of here, I'm going to explain to you some things about what we're going to show. And I'm going to talk to you a little about Suzette.

We are here because this is a very serious disease. And in order for you to understand that -- you've heard it throughout this

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afternoon and a couple days, I want sinusitis -- I want to talk to you a little bit about the anatomy of sinusitis. And you can have a pretty good understanding of what the testimony is going to be.

Pardon my back.

Can you all see that?

That is a picture of a face. The sinuses, there's eight sinuses. There's two frontal sinuses here, the ethmoid sinuses, the maxillary sinuses. Now, the sinuses are cavities in the face. And sometimes, if you see a skeleton you can see the holes in the skeleton.

Nobody really knows why we have sinuses. A lot of scientists believe that the reason for sinuses, why they're hollow, is to allow our heads to not weigh as much, so we don't put so much strain on our necks when we walk. But the sinuses have a function. And I'm going to explain that to you.

The sinuses do not take air, but they have a lining inside. And throughout the nasal passages, which are over here, they have a lining and the lining is called cilia. And the cilia are little like, the best way to describe

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them are like tiny little hairs. And the cilia serve a purpose. They serve several purposes, as a matter of fact.

One of the things that the sinuses do, the sinuses create mucus. And believe it or not, the evidence is going to show that mucus from the maxillary sinuses even flows upward, this way. Because the cilia as little transport hairs have the ability to push the mucus up here through a little opening here called the ostium. Little opening here is called the ostium. And eventually that mucus goes into the back of our throats, goes down our trachea and is eventually digested.

Now, the purpose of the cilia is to, in addition to transport the mucus, also collects things that come to our nose, dust, it protects us, protects us very well.

This cilia also have what is called eosinophils. And they're properties in our bodies used to fight disease, such as bacteria and viruses. This system is a very effective system if you have dust, an example could be you have dust coming up to your nose, if you have a dust storm or you're around it. What it does is

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it cleanses your nose; and it's constantly working. The cilia are constantly working to cleanse your nose and get rid of things.

What is sinusitis? Sinusitis is an inflammation, an infection, inflammation, infection of the sinuses.

How does that occur? I already explained to you that we have the ostium here, those little holes. What happens is when tobacco -- tobacco smoke, which is -- Mr. Hunter has explained to you -- is an irritant. One of the most potent irritants you can have. Toxic, toxic smoke. And when you breathe it, when you smell it, what it does is irritates your entire lining. It irritates it. Your body is reacting to this. Your body is fighting. And so what it does, is when you have irritation, severe irritation, it blocks the ostium, these little holes, they're blocked.

Well, what happens when they're blocked? The mucus is unable to travel out of the sinus and you end up with this congestion in the face and up here.

And the clinical symptoms, the signs of sinusitis are this pressure in the face, a lot

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of pressure, headaches, drainage, because your body is fighting this. And some of the things that occur to you -- you even get bad breath, halitosis, an infection. And once you get the infection here, the bacterial infection here, the only way you can fight it is with antibiotics.

Now, what happens when this happens on a routine basis? When this happens on a routine basis, physicians have to go in there and use an endoscope in here and go in here and clean this out. They do it under general anesthesia. It's a painful procedure. In order to -- in order to alleviate the pressure and try to get you back again.

Now, our bodies are very resilient. The evidence is going to show that once in a while somebody can get this infection and go on through life and not get it again. But if you're constantly exposed to an irritant, you have a high likelihood of getting the irritation and the sinusitis over and over and over.

Sinusitis goes from being an acute case of sinusitis and over and over and develops into a chronic case of sinusitis. And once it's

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chronic -- once it's chronic, the evidence will show that you end up with permanent damage. The cilia no longer work the way they used to.

The cilia don't have the mucociliary transport clearance, what they call it. They don't have the ability to work any more.

So when that happens, then anything you breathe into your nose can hurt you, can irritate you, because you don't have the ability -- your body has lost that ability to process foreign matters, dust, pollens, viruses, bacterias. You've lost it. And for the rest of your life you're going to have this condition. And that's what Suzette Janoff has.

The evidence in this case is going to show you, ladies and gentlemen, that she suffers. And there's no dispute in this case, they stipulated, the Court told you, there's no dispute that she has chronic sinusitis. So that's not an issue for you to worry about in this case.

You already have been instructed concerning the presumption.

Now, one of the other ways that we know that somebody has sinusitis is -- besides the

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endoscope -- is visualizing a CAT scan or an X-ray. In this particular case, you're going to see that as far back as 1989 there was an X-ray that showed thickening of the maxillary sinus, which is this one over here. This is where her main problem is. And I'm going to explain to you why this -- it's significant in terms of their defenses in this case, their medical defenses, or what they consider their medical defenses. That's the reason we're here.

Now, let me explain to you a little about Suzette Janoff, because I want to let you know what the evidence in the case is going to be regarding her.

Suzette was born in Minnesota in 1957. Early on in her life her family moved to South Dakota. And her folks got divorced and separated. She was raised by her mom. And she had three sisters.

Suzette was basically raised in South Dakota, one of the healthiest places in the United States probably.

She attended school in South Dakota. In high school she fell in love, got married, had a baby. She was very, very young. She moved with

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her husband to Utah. And things didn't work out. You're going to hear that when she was young she tried smoking, like a lot of teenagers did in their early teen years. And when she went to Utah, she discontinued smoking. She had a baby and got out of high school and enrolled at Weber State College as a young, young girl. Worked three jobs. Eventually the marriage didn't work out.

She continued working three jobs and graduated from college in four years. She was an excellent mom. You're going to hear that from her son.

After college, she went to graduate school. And continued working full-time to make ends meet. Take care of her son.

She always put her son first. In 1983 an opportunity arose. She was making $6,000 a year. And college loans were right around the corner. She had to start paying them. She borrowed money, like I said, she got out of college in four years working at the Swamproot Bar, working here, working there. Three times, three jobs sometimes.

So what does she do? Suzette hears that

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American Airlines is hiring. And she spoke to some friends and they said, this is a beautiful job. Imagine being able to travel internationally. Being from Sioux Falls, she never travelled before. And she was fascinated. She took a trip to Peru while in college. Thought, this is great; what a great job. What a great job.

And she applied with 40 other applicants. And they took her to San Francisco where they interviewed her. She was older than most of the ladies in her class. And after that interview they sent her to Dallas to interview again. And guess what? She was hired. She was hired as a flight attendant for American Airlines.

And she went to work for American Airlines. She moved to Dallas. She moved from a little town called Ponder, Texas right outside the Dallas airport, her and her son. And she had her sister come over and live with her so she could fly and at the same time raise her son.

And in one year she went from making $6,000 a year to making $18,000 a year, having health insurance, having dental benefits and having a job that she was very proud of. She was a

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proud -- she was a good -- you're going to hear she was an excellent flight attendant. Dedicated, she likes people. She likes to serve. She's a service-oriented person. That's what she wanted to do.

Suzette goes to work for American Airlines and starts flying in the United States domestically, Dallas, Oakland, San Francisco, Odessa, Texas, all the routes. She has no seniority when she starts obviously, and there's a probationary period.

By the way, you're going to here that during the times when she lived in Texas Suzette's son, being a single mom, played baseball, played basketball, played football and tennis, was vice-president of his junior high school class. And she was there at all times. And when she wasn't there her sister Cindy was there or some good close friend of hers was there to make sure that her son was doing the right thing.

I'm not going to give you the entire medical history, but I think you should have some of it so you understand some of these events.

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She goes to work in late 1983 as a flight attendant. And she's going to testify that as soon as she got on an airplane it was horrible. She couldn't believe it. She was shocked at the quantity of smoke. Now, this is the height of the smoke in aircraft cabins. People don't realize nowadays, but you're going to hear that you would walk into the back of an airplane or on an airplane and everybody is smoking and you're going to see photographs of the aircraft that she flew. And she had the least amount of seniority, so she wasn't up in first class. She was in the back taking care of the passengers in the smoking section, in the coach section where all the smoking was allowed.

You're going to hear that when she began working she would come home and her uniform stunk so bad, her hair, and she started feeling bad. And she complained to her supervisors, but, hey, so what?

In December of 1984, roughly a year -- year after she starts flying, she ends up with a blocked right ear after a flight. The flight was on the 4th, the 5th and the 6th of December. And on the 6th she develops a blocked right ear.

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Now, what's important about her condition, and you're going to hear this from one of the physicians, this is called a eustachian tube. It goes to the ear. There's a connection between the sinus passages and the eustachian tube that goes to the ear.

The eustachian tube also has cilia. This is a narrow tube. It also has the same cilia that has the transport system that I've already described to you. Well, eustachian tubes also get irritated with pollutants, with toxic fumes. She has -- you're going to hear from a doctor, you're going to hear from Dr. Lumry, and I'll talk to you about it a little later, that when you have an irritation in your eustachian tube you're unable to clear your head when you have high pressure in airplane, you're unable to do it. A normal person can do it. We can all do it. Sometimes children can't do it because of the formation of the tube, eustachian tube.

But you're going to hear that that is also a problem that occurs.

I've already told you that in December she has a problem, 1984.

April 10th of 1985, blocked ears again.

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Redness observed. And a lot of these records, ladies and gentlemen, are contained in the American Airlines medical records. You're going to see -- you're going to see her entire employment records in this case. They're extremely large. And because of the nature of the work, you're going to see that American Airlines keeps a lot of medical records. Because obviously people's safety is involved and they want to know what flight attendants are doing and what their health is all about.

In April, April 2nd of 1987, blocked ears again, treated by American Airlines. Sinus, congestion, coughing, another smoking flight.

November 18 of 1987, blocked ears, upper respiratory infection, eustachian tube dysfunction. She's going to tell you she went to see a Dr. Bill Burke who treated her.

11-23 of '87. She comes back from a trip and she goes and sees Dr. William Lumry. Dr. Lumry is board-certified in allergy, and you're going to hear his testimony videotape. We took his videotape deposition for trial. He's from Dallas, Texas. Now you're going to hear that I never spoke to Dr. Lumry before this

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case. I don't know who Dr. Lumry is. You're going to hear that I found one of his records and we took his videotape deposition so we can present it to you in this trial. This was 1987. Dr. Lumry examined her. A very well qualified -- he went to Loma Linda Medical School, University of Texas, board-certified in two specialties and he examined her.

And what's interesting about his examination is that she gives him a history of being exposed to secondhand smoke in airplanes. He doesn't write it down, but he examines her and he says, you have a condition called vasomotor rhinitis.

Now, there's going to be -- vasomotor rhinitis is an irritant. It's an irritation in your nose. It's another word saying you have an irritation from something, from chemical exposure or a pollutant. And he recommends that she stay away from smoke, which is her job.

And he also testifies, you're going to hear him, that when you have this irritation, this irritation can lead to sinusitis. In 1987. That's Dr. Lumry.

Suzette, after Dr. Lumry, that's in '87.

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In 1988 you heard about the bans on smoking. In 1988, it was April 1988, the two-hour ban is implemented. Is that significant in this case? Well, I submit to you that it really isn't that significant. The Defendants are going to make a big deal out of it, but this is a two-hour ban. And you're going to see that her illnesses and her medical treatment after two-hour ban continues. Why? Because she's still exposed, because a lot of the trips that she takes are longer than two hours. So the trip is longer than two hours from San Francisco or Oakland to Dallas, she's still exposed to the smoke.

In April of 1989 she also has rhinitis, allergic and sinusitis. She feels terrible. Later on in that same month of 1989 she's also sick.

In May of 1989 she has another situation concerning her illness and the blocked ears.

May 12 of '89 she has eustachian tube dysfunction.

5-16 of '89 the X-ray is taken that shows that she has a problem with her right maxillary sinus.

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5-7, 1989, American Airlines is getting a little upset. Suzette, what's the problem here? And they even -- they call her in and she has medical clearance evaluation. You're going to see the records.

This process continues. And in late May of 1989 she goes and sees a Dr. Jack Wise, who begins treating her and makes her feel better.

After that, she develops more congestion. And she's going to testify about all this. I just want to give you a run down.

And in 1990 she has some problems. She returns from Chicago. Has problems.

In January of 1992 she goes to somebody who took Dr. Wise's office practice, Dr. Mariel Stroschein. Now, Dr. Mariel Stroschein is a very important witness in this case. Dr. Mariel Stroschein diagnoses her with rhinitis, chronic sinusitis back in 1992. And Dr. Mariel Stroschein, you're going to hear, is a board-certified physician, went to NYU. In addition to her board certifications she has done a fellowship.

And you're going to hear from the doctors, some of you may know this, a physician usually

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finishes medical school, does an internship and then does a residency. And then has to sit for board exams, which is the highest level in their specialty, they're qualified. They're tested by the group that -- whatever group they belong to. And she's a very qualified physician who has a practice in Scottsdale, Arizona, right down the street from Suzette's house. And Suzette starts seeing Mariel Stroschein. Mariel Stroschein has seen Suzette for 10 years now on a routine basis.

In 1993, Dr. Stroschein is of the opinion that she needs surgery and performs a surgery.

And the surgery, you're going to hear, is this endoscopy, where she goes in here and has to clear this out. And she also performs another surgery on a little piece of cartilage here called a concha bullosa. I'm going to explain to you why that's significant.

You're going to hear from Dr. Stroschein, her testimony on direct examination is about an hour and 15 minutes. And Dr. Stroschein is going to tell you that in her opinion a contributing cause to her condition, the chronic sinusitis, is her exposure, long-term exposure

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to smoke in the aircraft cabin.

This is 1992. This is 10 years before we're in this courtroom.

She sees her '93 -- I'm sorry, she sees her again after the surgery in '93. She sees her in '95. She sees her for quite some time and treats her for -- constantly, she became a regular patient of Dr. Stroschein.

Dr. Stroschein has concluded that her condition is permanent. That Suzette is not going to get any better.

And in 2000 she performed another procedure.

Now, you have to understand this, once this process, this permanent damage has occurred, there's really very little physicians can do. They can go in there and try to clean this out and try to give you some relief, which lasts for a period of time. But you become sensitive, very sensitive to a lot of things in your environment.

You're going to hear from Suzette that she wears a mask now. You're going to hear how her life has changed. She wears a mask -- and I submit to you Defendants are going to try to

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make a big, big deal because they've asked a lot of questions about the mask -- she wears a mask so she can avoid having anything get in her nose. She takes rinses. She does rinses in her nose on a daily basis. She avoids restaurants that have any smoke. She doesn't go to places -- her life has totally, totally changed. And this is a young woman. You're going to hear that, her life has totally changed.

Suzette in 19 -- over a year after leaving the airlines, she quit, she quit American Airlines. You're going to hear that in 19 -- exact date was 1996, she quit American Airlines. During this period of time Suzette moved to Scottsdale and began dating a gentleman, she's married. She married him about, after leaving the airlines and that's where she lives in Arizona.

You're going to hear from her that her life is miserable. I mean, she looks healthy as she sits there, but her life is miserable. She has problems all the time. She has problems coming to this trial here. Because all kinds of things affect her now. She's more delicate than she ever was because of this injury.

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The Defendants in this case, as Mr. Hunter touched upon this briefly, are going to tell you -- I'm going to tell you why you should discount the defense. They're going to tell you --

MR. REILLY: I'll object, Your Honor, as to argument, by why you should discount the defense.

THE COURT: Sustained.

MR. WILLIAMS: I think what the evidence is going to show in this case is that Ms. Janoff does not suffer from allergies. The evidence is going to show that what Suzette, you look at her personnel file from the beginning, when she was tested by American Airlines, didn't have any allergies, when she lived in Ponder, Texas. She had a house with a dog -- two dogs and a son and trees. And she's never had any watery eyes, any sneezing. She lives in a house right now, she'll tell you, she's got orange trees that she -- and she plants. She likes to work in her yard. She's out there in the front yard in the back yard with orange trees blossoming, she doesn't sneeze, she doesn't have runny, watery eyes, so keep that in mind as you listen to the

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evidence.

They're going to tell you that her condition may be from barrow trauma. There's going to be no evidence of that.

They might tell you her condition is from dust, mites, mold. You're going to hear that they had a fellow come to her house and examine her house for four hours and take a vacuum cleaner and get under her bed and couches just to find something.

You're going to hear she doesn't sneeze in her house, her eyes don't tear up and her house is very clean.

In this case the evidence is going to be unquestionable, unquestionable that her condition that she has was substantially contributed by her long-term exposure to secondhand tobacco smoke in the aircraft cabin; there's no question about that.

Ask you to please just pay close attention -- I know you're very interested in this case -- listen to the evidence and just use your common sense and listen to the witnesses. You're going to listen to Suzette. Use your common sense. I'm certain that when this case

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is all over next week, you listen to the court's instructions, you're going to find that the companies those gentlemen represent are who is at fault in this case.

Thank you.

THE COURT: Thank you, Mr. Williams.

MR. REILLY: Won't take but one minute. Sorry for the delay.

One is blank; one has a time line on it.

Can everybody see that?

Well, good afternoon. May it please the Court. Ladies and gentlemen, gentlemen.

You all know I'm Ken Reilly and I represent Philip Morris in this lawsuit.

Mr. Hunter just referred to me and the other gentlemen at that table as tobacco lawyers. We know why that reference is made, because today people have lots of emotional responses to tobacco companies, to smoking, to whether or not smoking causes disease. I mean, during the voir dire process everyone had emotional comments about smoking, tobacco companies, et cetera.

But this case is not about whether or not smoking causes lung cancer. This case is not

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about whether smoking causes disease. You heard Mr. Hunter talk at great length about the Surgeon General and the '79 Surgeon General's Report and all the diseases that cigarette smoking causes. You know, this case is about one disease. This case is about chronic sinusitis and that's all.

I'm not going to stand up here and tell you that smoking doesn't cause lung cancer. It does. I'm not going to stand up here and tell you that every action by a cigarette manufacturer employee was always the brightest or the smartest or the nicest or the most saintly thing they could have ever done. I'm not going to do that. But what I am going to do in this case is focus on the issues of this case. Not the issues of some hypothetical case or something that occurred in 1962 or something that occurred in Europe or Australia or somewhere else. I'm going to talk to you folks about the facts of Ms. Janoff's case. Okay?

I have a time line here. In just a minute I'll turn to that time line. But before I do that let's talk about some things that are not in dispute.

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Just a moment ago I said there is no dispute smoking causes lung cancer, not in dispute. Cigarette smoke can irritate some people sometimes. Not in dispute.

I think some of you folks may have indicated during voir dire that smoke could irritate you sometime someplaces. Not in dispute.

Not in dispute that Ms. Janoff has chronic sinusitis, not in dispute.

Actually, what's not going to be in dispute is that Ms. Janoff has allergies. You heard Mr. Williams say she doesn't have allergies. What he didn't tell you is that she -- matter of fact, he ignored several doctors in her medical chronology, several doctors, a serious omission.

He didn't even mention Dr. Morgan, who has tested her on two occasions, her doctor. Until this lawsuit came about, I never even heard of Dr. Morgan. I've never met Dr. Morgan. Nobody over there has ever spoken to Dr. Morgan. Dr. Morgan has tested her twice in Scottsdale, Arizona and found that she has allergies and her allergies are getting worse. But Mr. Williams just told you she doesn't have allergies.

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You're going to see there was a mention of Dr. Stroschein. During Dr. Stroschein's deposition, during my cross examination, you're going to watch Dr. Stroschein going through her file observing the reports that she received from Dr. Morgan of the results of the allergy testing. You're going to see it. These videos are in the can, as they say. Everybody in this room knows exactly what these people are going to testify to because it's in the can.

No mention of Dr. Morgan, huh? No mention of the allergy testings. No mention of the fact that she has allergies. She was tested, you'll see this in a little bit, she was tested in 1997. Allergies. Tested in 2002. Allergies getting worse.

But I'm getting ahead of myself a little bit.

What else isn't in dispute in this case? There is no dispute that cigarette smoke doesn't cause allergies. It's not an allergen. Every doctor that's going to come before you that gets asked that question is going to say, no, cigarette smoke is not an allergen, doesn't cause allergies. There's going to be no dispute

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that allergens, you heard Mr. Hunter talk about we're going to -- he came up here and wrote on the board, we're going to be talking about all these things that are on airplanes, all these allergens, all these molds, all that stuff. Well, he's exactly right. We are going to talk about that. Why are we going to talk about that? Because her treating doctors talk about that.

Another doctor that got left off the agenda was Dr. Lanson. We'll talk about him here in a little bit.

We'll talk about him here in a little bit. Completely ignored. How can that be? How can you completely ignore --

MR. WILLIAMS: Your Honor, I object, this is argument.

THE COURT: Sustained.

You may rephrase it.

MR. REILLY: You'll see the medical records of Dr. Lanson. You'll see the medical records of Dr. Lanson, 1989, allergic rhinitis. All the way back in 1989.

But again, I'm getting ahead of myself.

There will be no question that all the

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doctors who testify in this case will tell you that allergies cause rhinitis. You'll see a diagnosis of allergic rhinitis on the part of Ms. Janoff. There won't be any debate about that in this case. You'll see that. Matter of fact, you'll see that Mr. Hunter commented on the connection between, or the activities involving, I think it was RJ Reynolds and Philip Morris and communicating or trying to engage discussion about secondhand smoke. You know what? There isn't going to be any evidence in this case that American Airlines and its employees ever did anything in response to anything Philip Morris, RJ Reynolds, Lorillard or Brown & Williamson ever did. There won't be one moment of testimony in this case that American Airlines ever did anything in response to anything any cigarette manufacturer ever did. Period, end of story. Watch for it.

This case is not about punishing cigarette companies. This case is not about whether cigarettes are addictive. I mentioned on voir dire whether there was going to be testimony about former smoking history on Ms. Janoff. This case has nothing to do with addiction.

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Mr. Hunter showed you on the camera here about a presumption that secondhand smoke causes chronic sinusitis. In fact, that's a legal issue that the Court has determined. But that doesn't make the science, that doesn't make the medical science in the case. You're going to hear doctors tell you whether or not secondhand smoke causes chronic sinusitis, period. This is something for you to decide. In addition to that, the burden isn't on the Plaintiff to establish that her chronic sinusitis, which we all agree she now has, was caused by her exposure to secondhand smoke. That's her burden to prove. If we stopped this case right now, when no evidence has been presented, we win. We win. Period.

I promised you that I would get to the time line and that's exactly what I'm going to do right now.

Many of the things -- some of the things that Mr. Williams went through with you regarding the history of Ms. Janoff are true. But what this case is about, there are three things that this case is about. Control.

I'm a very poor writer. Can everybody read

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that? Control. I knew my school teacher would know I was a very poor writer.

Control, causation and responsibility.

And as I go through the history of Ms. Janoff, those are the issues that are going to be important in this case.

Ms. Janoff is suing, asking for money because she claims that her exposure to secondhand smoke while she was on board airplanes working as a flight attendant caused her to develop chronic sinusitis.

And the questions are, who's in control, who's in control of her exposure? What was the cause of her chronic sinusitis? And who's responsible?

In order to know the answer or to determine the answers to these questions you're going to have to learn during the course of this trial what choices were available to Ms. Janoff; what decisions she made; what choices were available to American Airlines regarding how its employees operated their aircraft, controlled the environment on board airplanes, American Airlines' airplanes. And you're going to have to know where, if anywhere, the cigarette

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manufacturers are ever involved in the control of Ms. Janoff's exposure to secondhand smoke.

That's what the facts of this case are about. That's what the evidence of this case is about.

Where do the tobacco companies figure in into the decisions about Ms. Janoff's exposure? Where do they fit in?

So let's start with Ms. Janoff's history.

Mr. Hunter started in 1962. I think that Ms. Janoff was probably about eight years old in 1962. I don't know why we're talking about 1962. But I do know that in 1973 Ms. Janoff married Mr. Michael Blue. She married Mr. Michael Blue. Now, Mr. Michael Blue -- Mr. Williams said they were young, they were young. She was 16 years old or so. Mr. Michael Blue was a smoker. And so during their marriage Ms. Janoff, while she was Mrs. Blue, was exposed to his secondhand smoke.

During the course of their marriage Ms. Janoff became a smoker. And she smoked for about a year, maybe on average five cigarettes a day, maybe it was a year, maybe a little longer, somewhere in that neighborhood. Not in dispute.

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The only reason it's important is because while she was a smoker and while she was living with Mr. Blue and exposed to secondhand smoke, did she develop sinusitis, rhinitis, anything? Nothing.

All right. Mr. Williams indicated that she divorced Mr. Blue or they became divorced in 1976. He mentioned that she went to college and he's right, she did. And like many of us, she worked her way through school. Not everybody gets a free ride. Many people -- we all have to work our way through school.

And during her school years she worked in two bars. She worked in the Swamproot Bar in Ogden, Utah, 1977, 1978. Sounds like it would be in Miami, but it's in Ogden, Utah. And during that time she was a bartender and a waitress.

Was there smoking in the bar? Smoking in the restaurant? Of course. Did it annoy her? Of course. She will tell you she's sure it did.

What did she do about it when it bothered her? Well, she's in a building, she can go outside. That's what she did.

She graduated from college. She got a

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degree in political science. You can do a lot with a degree -- I have one, you can do a lot with a political science degree. But she liked being in the service industry. She worked in another bar/restaurant called the Down Under Club. Another bar/restaurant where she worked again as a bartender and a waitress. Smoking in the Down -- still in Ogden, Utah. Smoking in the bar, smoking in the restaurant? Yes. Sure. Annoyed her? Sure. In a building? I think the Down Under Club -- the Swamproot Bar was a big place. The Down Under Bar may have actually been down under so you may have had to go outside by going upstairs. I'm not sure about that. But when it irritated her, go outside.

Mr. Williams indicated that she applied for a job as an American Airlines flight attendant in 1983 and that's exactly right. She filled out an application, sent it in and American Airlines said, come out to San Francisco for an interview. Now, she hadn't flown a lot before then, but as Mr. Williams said, she had taken a flight all the way down to Peru and back. And now, this is 1983.

Let me take you back 10 years to 1973, the

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year she married Mr. Blue. That happens to be the year that the government ordered that smokers and nonsmokers sit in different sections of airplanes. So in 1983 when Ms. Janoff was asked to come out to San Francisco she flew -- she chose the nonsmoking section of the airplane and flew out to San Francisco for her interview.

She's interviewed with a bunch of people, I think about 40 folks. Then they fly her back to Ogden, Utah. She selects the nonsmoking section of the airplane. And it's exactly true that when they close the door, if you don't like to be in a confined space with cigarette smoke when there's smoking on board the airplanes, you can't roll the windows down. I hope you don't roll the windows down. You can't open the door. You can't get off until the plane lands. Can't be done.

All right. They then fly her down to Dallas, Texas for a second interview. Nonsmoking section. If you don't like smoke on aircraft, now is the time to get off. They fly her back from Dallas, Texas. Nonsmoking section.

She begins her job, she gets accepted. She

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begins her job in 1983 as a flight attendant. Now, as Mr. Williams said, the very first flight she ever took she didn't like the amount of smoke that was on board the airplane, the very first flight.

Did she complain to anybody then about how much smoke she was being exposed to on the airplanes? No, she's on a probationary period and she's going to tell you she didn't complain to anybody about how much smoke there was for the nine-month probationary period. And then what happened? She started complaining and saying, I don't like this amount of smoke. I don't like this. You've got to stop this. The ventilation systems don't work right on these airplanes. The pilots don't turn on the nonsmoking signs often enough. We're not responsive enough. You don't clean the filters. We're not operating the airplanes enough. The customers are complaining. The complaining starts at the end of the nine-month probationary period and it literally will go on her entire flying career.

All right. Mr. Williams indicated that in December of 1984 she experienced an ear block

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when a plane was descending. And he mentioned Dr. Lumry. Yes, Dr. Lumry is going to come here and he's going to give you -- he's going to be here by videotape. And watch his videotape. Because I asked him about ear block. I think he may call it eustachian tube dysfunction. Much bigger term. Ear block.

You guys can experience it when you go up on an elevator. You don't even have to go up on an airplane. When you go up on an elevator and then when the elevator goes down sometimes you have to pop your ears, you've all done it. Everybody has done it. If you can't equalize the pressure on your inner ear and your outer ear, you're going to get an earache. It happens.

And it's an occupational hazard for flight attendants because planes go up, planes go down, planes go up, planes go down. Listen to Dr. Lumry, he's going to say -- I asked him, it's an occupational hazard. Yeah.

Is anybody going to tell you that her ear block was caused by secondhand smoke in 1984? Nope.

All right. Let's talk about Dr. Lumry.

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She sees him in November 1987. Do you know how many times she saw Dr. Lumry? One. She went to see a Dr. Bruce five days before she went to see Dr. Lumry. Five days. She went to see him for a sinusitis problem.

Mr. Hunter said, I'm going to tell you that there's bacteria on the airplanes. You know what, Dr. Bruce gave her a prescription for antibiotics for the bacteria in her sinus. Sure there are bacteria on airplanes. There are bacteria in this room. You don't have to be on an airplane to encounter bacteria. And you sure as heck don't have to be on an airplane to get chronic sinusitis or sinusitis. It is the most common -- it is the most common illness that we suffer from. We, 35 million Americans, every year go to the doctor for sinusitis. You don't have to be on an airplane to get bacteria or a virus. Viruses, you don't have to have bacteria. You can get a virus and get sinusitis.

So, but by the time she gets to see Dr. Lumry five days later, Dr. Lumry is going to tell you he found no evidence of sinusitis. The antibiotic is working.

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What does he see her for? He sees her for a runny nose. That's what vasomotor rhinitis is. It's an irritation of your nose that makes your nose run. When you smell an onion, when you go outside on a cold day, we don't have them here in Miami, thank goodness, but if you were in Michigan and you walked outside of your warm house and it was 20 below, you know what the first thing that happens is? Your nose runs. And watch Dr. Lumry's testimony. The evidence in this case, Dr. Lumry is going to say, you know what, cold air causes vasomotor rhinitis.

Dr. Lumry -- I asked Dr. Lumry, Dr. Lumry, could you determine what the irritant was? No, I couldn't determine what the irritant was. But he's going to tell you that I did recommend that she stay away, this is 1987, I recommended to her that she stay away from secondhand smoke, cigarette smoke. In 1987.

Where were the cigarette manufacturers in that meeting? No where.

This date is kind of important because here's Dr. Lumry -- oh, by the way, two other things about Dr. Lumry's visit. How much of an irritant was there? How much irritation was

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there? How much swelling was there? Watch what Dr. Lumry has to say. The word minimal is going to be what he describes it as. Minimal. And he's going to say, basically I expected her to do just fine. Unless she went into a smoky bar or restaurant, something like that. Or a place that had cold dry air. Do you know how dry it is in an airplane? Two percent humidity on airplanes. That's dryer than the Scottsdale desert.

The other thing that Dr. Lumry is going to tell us is I didn't do any testing for allergies, I didn't. Unfortunately for Dr. Lumry, who is an allergist, he didn't have the benefit of what comes right down here in April of '97, May of '97 and July of 2002, when Ms. Janoff finally gets allergy testing. But I'm getting ahead of myself. I don't want to drop to the bottom of the board quite yet.

He sees her one time. Why did we take the deposition of somebody who saw her one time 15 years ago?

Well, he also described the inside of her nose, the skin on the inside of her nose as pale. Pale. Why is that important? Because

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that's what the inside of your nose looks like when you have allergies. That's what the evidence is going to be.

November of '87 is kind of an important date. Why? Because it is five months away from when the two-hour ban went into effect, as of April of 1988. And Ms. Janoff has always been a domestic flight attendant, remember what I said, domestic flight attendants are people who fly from one destination in the United States to another destination in the United States. No international flying. That's a different ball game. She's always been a domestic flight attendant.

And this is for domestic flights. You fly from Miami to Atlanta, that's a domestic flight. You fly from Miami to London, that's an international flight.

This two-hour ban affected 82 percent of all U.S. flights. 82 percent.

Does that mean that 82 percent of Ms. Janoff's flights immediately became smoke free? No, it doesn't. Because American Airlines didn't design routes to maximize the nonsmoking flights, so if any flight attendant

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Her choice. You don't have to do what your doctor recommends. You don't have to do it. But if you don't, then some things you don't find out, right? So she didn't have the allergy testing.

At this point she does have a discussion with American Airlines. American Airlines has a conference with her and they say, maybe -- you keep complaining about bad air on airplanes, you keep telling us you're having problems, maybe you should take a ground job.

Now, I don't know, all I have is the records, and yes, we've agreed, we've stipulated to put these employment records into evidence so that you folks can see them. Some of them are a little hard to read because they're photocopies and things like that. But we will -- I know I'm going to separate them out and make the ones that I think are important to you available to you.

American Airlines says, maybe you should take a ground job.

Now, Ms. Janoff is going to tell you, you know what, they didn't mean that, that was an act of coercion. I don't know whether that

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means a ground job with American Airlines or just a ground job doing something else. I don't know the answer to that. But Ms. Janoff can explain that to you.

What I do know is that she viewed that as an effort at coercion on her part. Not a real offer, if it was for an American Airlines job or a threat, if they were saying you better take a ground job doing something else. I don't know whether American Airlines was trying to coerce her or not.

What I do know is that Philip Morris, RJ Reynolds, Brown & Williamson and Lorillard had nothing to do with this discussion.

August of 1989. Just an example -- just an example of the complaints that Ms. Janoff was making. She wrote up -- and you'll see it -- she wrote up on a report form that on a flight that she was on the smell of urine from the bathroom -- she was back in the back of the plane -- she says the smell of urine and the cigarette smoke was so bad for me that it made me nauseous. Nauseous. She said the ventilation system doesn't work right and the pilot is not paying any attention.

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There will be no evidence that Philip Morris, Lorillard, Brown & Williamson or RJ Reynolds controlled how the employees of American Airlines operated the ventilation system, selected the ventilation system, turned the no smoking sign on, dealt with the lavatories or decided when people could or couldn't smoke on board the airplanes. There isn't going to be -- we play no role in this.

Here we come to perhaps the most interesting part of this whole lawsuit, not even mentioned, not even mentioned by Plaintiff's counsel. A total ban on domestic flights went into effect in February of 1990. Total ban. No more smoke. You fly from Miami to Atlanta, no smoke. You fly from Miami to L.A., no smoke. None. None at all.

Ms. Janoff has always been a domestic flight attendant, always. Really never as an international flight attendant.

From April on -- I'm sorry, from February on she will never again have to fly in a plane that has smoke on it if that bothers her. She'll never again have to fly on a plane that has smoke on it.

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March she broke her toe in Acapulco, didn't fly all of March. April she flies the whole month, domestic routes, no smoking.

What happens in the next month? She transfers to international where smoking -- where American Airlines still permits smoking. She has left smoke-free environment and gone to an environment where smoking is permitted.

You know what, at this point American Airlines sits down with her -- that's what they call a board of injury, BOI. You'll see the form it says BOI -- and they talk to her about several things. But one of the things that she's asked about is they say, what are you doing? You have complained so long and so hard about your exposure to secondhand smoke and the bad air where smoking is permitted on airplanes and you are transferring to international?

And right there in the report you're going to see where it says that Ms. Janoff said, I think it won't be a problem. And if it turns out to be a problem, I'll just resign and transfer back to being a domestic flight attendant.

Now, who is making the choice here? Is it

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us who is making the choice? What does American Airlines say? American Airlines is discouraging this. They're astounded by it. It's right there in the evidence.

MR. WILLIAMS: Your Honor, I have to object as to the characterization, they're astounded. This is argument.

THE COURT: Sustained.

MR. REILLY: Read the record. May 1st, 1990 she starts flying internationally. And she flies international until July 31st of 1990. And at that point she asks her supervisor to write a letter to management saying, I want to come back to domestic. Now, you might think that that was inspired by the amount of smoke that she encountered and she didn't like it. But that wouldn't be right. She didn't ask to come back to domestic as of July 31st or August 1st. She said, I'd like to come back to domestic as of November 1, 1990. Three months away. And why? Because American Airlines has changed, has changed, they've opened up international for bidding for -- have changed the seniority bidding arrangement on it, so that now a lot more flight attendants can bid on

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flight attendant, never again exposed to cigarette smoke, right? Wrong. Wrong. She makes another choice. June 1st, 1991 she chooses to go back to international flights away from smoke-free environment and becomes an international flight attendant again. This time she has to work to do it. She has to agree to learn how to do cooking in the first and business class galleys so that she can train other people to do first and business class, train other flight attendants to do first and business class galley cooking. That's how she gets back in international flying. Back into environments in which smoking is permitted.

Who makes the choice here? This is about control. Who's in control? Who is in control?

And she continues as an international flight attendant right up until March 1st of 1996. Now, I have to tell you that there's even a time in here in 1994 where for about a month she does nothing but domestic flying, looks like. Or maybe a combination of domestic and international flying, if maybe a trip to Bermuda is international. But most of it is domestic flying.

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Who's making the choices here? Who's doing that? Philip Morris, RJ Reynolds, Brown & Williamson, Lorillard?

MR. HUNTER: I haven't objected, but he keeps arguing this choice argument over and over again.

THE COURT: This is an argument. Sustained.

MR. REILLY: Thank you, Your Honor.

All right, what's the evidence going to be? The evidence is going to be that -- I should really put this in here. January 1992 is the first time she goes to see Dr. Stroschein. And she begins to see Dr. Stroschein about -- she sees her twice in 1992 and twice in 1993 before she has her surgery. Twice in 1993 before she has her surgery.

Of the four visits, two of them, and listen to Dr. Stroschein because that's where this evidence is going to come from, two of those visits Dr. Stroschein diagnoses her with a bacterial infection in her sinuses. Mr. Hunter said I was going to blame it on bacteria. The evidence is going to be Dr. Stroschein is going to say two of these visits, I think there's one

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in I think it's May of '92 and one in July of '93, she prescribes antibiotics for bacteria.

She has surgery in November of 1993. But leading up to that surgery is sort of an interesting chain of events.

Ms. Janoff has decided that she wants to have some elective surgery and she goes to a plastic surgeon for elective surgery.

She goes to him first. And then she goes over to Dr. Stroschein.

I should back up and say some of the surgery is totally elective, some of the surgery has to do, she's having a breathing problem, breathing problem unrelated to sinusitis in terms of -- you didn't hear that doctor's name either, Dr. Friedland.

Now, Dr. Friedland, you're going to hear Dr. Stroschein refer to Dr. Friedland. And she's going to say that Dr. Friedland was not operating on her for her sinusitis, but in fact Dr. Friedland was going to straighten her deviated septum. This is your septum. And he was going to straighten that. And he was going to deal with her turbinates, which are -- I'm not going to stick my finger in my nose. So if

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you were to feel inside your nose, which I don't recommend you do at this moment, you would feel, and you can't really get up that far, but you would feel that there were some curves, some curvy parts inside and those are called your turbinates. And hers were a bit swollen. So he was going to reduce the turbinates and straighten her deviated septum. And that was designed to improve her breathing. Along with the other surgery that he was going to do.

And she then goes to Dr. Stroschein and says, hey, I'm going to have this other surgery done, what do we think about doing sinus surgery at the same time? And this is the first time that Dr. Stroschein in her records -- you can see it -- talks about doing any kind of sinus surgery on Ms. Janoff.

And so they do all this all at the same time. All this elective surgery, improve my breathing surgery, sinus surgery all at the same time.

Now, you'll hear me ask Dr. Stroschein whether or not she might have delayed doing that sinus surgery if all this other surgery wasn't going to happen at the same time. And she says

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something along the lines of, I don't know, maybe, but if I think I can do my patient some good.

The reason that's important is because you're going to hear from some other doctors who come in here that unfortunately what causes Ms. Janoff's sinusitis today is a combination of her allergies and the fact that she had this surgery before the allergies had really been explored and enough of a work up had been done to avoid doing the surgery at that point. Because once you do surgery, you're going to disrupt how the sinuses work. God made them one way; doctors make them another. And they just -- when you do that surgery, you run the risk that they're not going to be the same and they're not going to work the same. And you run the risk that you're going to have problems down the road.

Ms. Janoff returns to being a flight attendant and she continues to fly internationally with the exception of the period of time I mentioned in '94. She continues to work as a flight attendant and complain. You're going to see an August of 1995 complaint

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about -- this is a very interesting one, this is a very interesting one, because Ms. Janoff is going to complain about what it's like in the back of the plane. She's going to say, gosh -- she's going to start this one off by saying: For years I have bid away from cigarette smoke successfully on the airplanes. Successfully. That means that she has used her bidding ability to be in nonsmoking sections of the airplanes. But just recently, on some flights I have been -- I've been in the back of the plane and I've been exposed to secondhand smoke and I don't like it. And we're not doing enough, the ventilation system isn't working well enough. There are too many people congregating back there. A whole host of comments and comments about the smoking flight attendants that smoke and she's weary of doing their work and all that kind of stuff.

You're going to see those complaints right up to August of 1995.

Then she retired in March of 1996.

I don't know whether or not she's going to contend that her retirement was caused in any way by her sinus problems. But if she does we

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will present evidence right out of her employment files that reflect exactly why she was retiring at that point in time. And there are multiple reasons. Number one, way back here in 1985 she had had some other elective surgery that caused her problems. And those problems were causing her to have fibromyalgia, osteoarthritis, shoulder problems, a whole host of problems that caused her to take Robaxin, some other medications and caused her to not -- the doctors to give her a 20-pound lifting limit, to have her taking medications that compromised her balance. Totally unrelated to sinuses in any way, shape or form.

And in December, January and February of 1996 leading up to her retirement of March 1st, 1996 she is sending in medical records, medical reports from doctors that say, you know, she's got these lifting restrictions, et cetera. But at the very end of February she's got two flights to London. And she wants to go on those two flights -- they're the last flights of her career and her friends are going to be on it and she would like to take those flights. So she gets a note from her doctor that says she's

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ready to fly. And American Airlines goes, wait a minute. Wait a minute. We got all these records in here from your doctors that say you're on these medications, you got numbness in your arm and hand and shoulder and you got this lifting restriction, and you're telling us you're ready to fly? We're concerned -- and your taking medication that your doctor says can compromise your balance. They say, we're concerned about this. And Dr. Kowalski, I think that's his name, an American Airlines medical doctor, writes her and says: Here's why we're not going to let you fly anymore. And it's all about these problems. You won't see the word sinusitis in it anywhere. It's all about her shoulder problems, her fibromyalgia, her Robaxin that she's on. It's all about that.

Why else does she decide to retire -- oh, and he reports right in that record, he says: I have met with you, I have met with you. And the reason you've told us you don't want to fly anymore is because this job is just too physically demanding, too demanding.

Okay. I have no problem with any of that. But it has nothing to do with sinusitis.

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What else goes on March of 1996? Well, it just so happens that at that point in time for the first time ever American Airlines offers a buyout. They offer an early retirement package that has health benefits, money, flying. Quite a package. She takes it. A choice. She takes it. That's all right.

What else is going on? Well, she's scheduled to be married to her now husband Mr. Janoff. And they marry in July of 1996 out at their home in Telluride, Colorado. And I don't think they actually get married at the home. I think they get married at another piece of property that they have out there. And so she stops flying. Choice to be made.

She goes to see Dr. Morgan. Her selection, her choice. In Scottsdale, air zone A she goes to him on April 30th, 1997. He's an allergist, that's what he does. She fills out a form.

Now, you're going to see this form because it's right in his records, his regular records. It's got a page on it where, because he's dealing with allergies, he asks you to identify those things that trigger your allergies.

Well, of course you know she circles

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cigarette smoke, right? But she also, for a person who has never had allergy testing, she circles dust, mold, perfume -- or chemicals, strong odors. And she's going to tell you that if she goes past a perfume counter or if she goes by somebody with a strong perfume, it causes her a problem.

She does that before she's even seen the allergist. Now, some of the handwriting on that form I think is probably his or his nurse where they write perfume in big letters and put stars next to tobacco smoke and all that stuff.

And then he tests her. And she tests positive for allergies. Positive.

And we're going to bring you an allergist. We're going to bring you an allergist Dr. Michael Anderson, he's going to explain to you what allergy testing means and what a positive test means. He's just going to explain to you what it means.

Way back here, could have had that testing done by Dr. Lanson. Waits 10 years, 10 years? No, eight years to get it done in May of 1997. Dr. Morgan prescribes a treatment course for her. Does she follow it? I don't know, I guess

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we'll find out.

She continues to have sinus problems. She continues to see Dr. Stroschein, she has a sort of a follow up procedure in April of 2000. And then in March of 2002, guess what? She goes back -- do we send her to Dr. Morgan again? No. Is her sinusitis getting worse? Yes, it's getting a bit worse. Are her allergies getting worse? Does Dr. Morgan test her again at her request? Dr. Morgan doesn't call her up and say, come on in, I want to test you again. She goes back to Dr. Morgan. And he tests her again and she's got more allergies than ever.

What is moving -- we are now six years --

MR. HUNTER: Judge, I have to object to all these questions he asks. He's arguing his case.

THE COURT: Overruled.

MR. REILLY: The evidence will show that she is six years past her last exposure to secondhand smoke on board an airplane. But she never leaves the area where the things she's allergic to exist; dust, dust mites, you will hear me ask Dr. Stroschein: Doctor, are those things everywhere? I use the word "ubiquitous." I saw it when I was about 15 years old and the

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word has never left me. It means everywhere. And I don't even know why I -- you know, some words are just kind of funny and they stick with you. So I ask her: Are dust and dust mites ubiquitous? She said yes, they're ubiquitous. She probably thought I was a nut for using the word.

Dr. Morgan says, you better come in now, and we better start allergy injections. Another course of treatment. We have as many records as I know of from Dr. Morgan. And I don't know of any that reflect that she has started allergy injections. Maybe she has in the very recent past and we just don't know about it, but I guess we'll find out in this trial.

But to say, to say that she doesn't have allergies, to say that to you when she's been tested twice and everybody in this room knows it --

MR. HUNTER: Judge, this is argument, I object.

THE COURT: Sustained.

MR. REILLY: I said that she retired. She didn't quite retire. Ms. Janoff has her own business. It's called the Bath Chemist. She

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mixes -- she makes her own bath salts, things of that nature and sells them. And yes, I did ask if people have ever worn a respirator or a mask. When Ms. Janoff works with these materials she wears a respirator, a respirator.

In her homes in [DELETED] and [DELETED] she has air purifiers, air filters, whatever you call them. Two in each house. One in the bedroom, I think in each house, one in the great room in one of the houses and one that she -- is portable and moves from room to room in the other house.

Of course they can't be there for cigarette smoke because there is no cigarette smoke in either of her homes.

There is a controversy in medicine today about whether or not secondhand smoke causes chronic sinusitis. I just want to talk to you about it a little bit.

You know, it's really remarkable, there are going to be -- if you include the videos, there will probably be about five, maybe six people that come in and talk about this.

Three of them are going to be people who actually take care -- at least three of them

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will be people who actually take care of patients who suffer from sinusitis. You heard about Dr. Richmond and you heard about Dr. Burns. You know, their testimony was taken in a different trial. You will listen to them talk about things and you'll wonder when am I going to get to the sinusitis? When am I going to get --

MR. HUNTER: Judge, again, this is argument. Object.

MR. REILLY: There is no evidence -- I'll rephrase it, Your Honor.

There will be no evidence in these videos of Ms. Janoff, American Airlines, control, choice, in connection with this flight attendant doing anything.

They will talk about the cigarette manufacturers and about cancer and about chronic obstructive pulmonary disease. They'll talk about a whole host of stuff. And I'm not going to stand here and tell you that -- I told you at the beginning, I'm not going to stand here and tell you that cigarette smoking doesn't cause a whole host of diseases.

MR. HUNTER: Judge, again, this is

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argument.

THE COURT: Overruled.

MR. REILLY: Thank you, Your Honor.

But that's not what this case is about. Listen for Dr. Richmond to ever use the word sinusitis. Dr. Burns does say that it can cause -- that environmental tobacco smoke can cause sinus disease. He does say that.

Now, listen to whether or not Dr. Burns says he's ever treated a patient for sinusitis in his life. Listen to see whether or not Dr. Burns says: I am an otolaryngologist or I'm an allergist. Because you know what? He's not going to say that. And why isn't he going to say that? Because he's not. He's a pulmonologist. He deals with diseases of the lung. That's a fact.

Dr. Richmond, they say he's the Surgeon General. He was the Surgeon General, he's not the Surgeon General now. He was the Surgeon General in 1979, '80 and '81. He hasn't been the Surgeon General for over 20 years. What is his medical specialty? He's a pediatrician. Does he treat patients, does he treat adults with sinusitis? You will not hear a word from

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him about him ever treating a patient with sinusitis.

So now let's focus on the people who are going to come here and talk to you about sinusitis and secondhand smoke. Okay. And you'll be very surprised, I think, at how similar their testimony is going to be. They do at the very end diverge. They do separate at the very end.

What Dr. Stroschein -- let me give you three of them, Dr. Stroschein, Dr. Kronberg and Dr. Anderson are all going to agree with several things. They're going to agree that there is no literature, no textbook that they have ever encountered, no medical textbook, no medical literature that has ever said that secondhand smoke causes chronic sinusitis.

They're going to agree that there is -- I think I said no literature, let me make sure I said that. No literature, textbook or literature that says that secondhand smoke causes chronic sinusitis, period.

They're going to agree that within their patient populations they have thousands of people that come to them with chronic sinusitis.

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Dr. Stroschein is going to say, you know: I see 1 to 2,000 patients visits per year of patients that I'm treating for chronic sinusitis. Dr. Kronberg and Dr. Anderson are going to have similar numbers. Dr. Kronberg is going to say I've seen that number of people every year for over 10 years. And they're all going to say, they're going to say it a little differently, but they're all going to agree that they never diagnosed people suffering chronic sinusitis due to secondhand smoke.

There's going to be one exception to that, Dr. Stroschein is going to say that in fact she has found one. Out of the thousands of patients she's seen, you know how many she's going to tell you she's diagnosed suffering from chronic sinusitis from secondhand smoke exposure? One. And this is it. This is it.

Now, Dr. Stroschein is going to say, look, I think that you can get chronic sinusitis from exposure to secondhand smoke because of its irritant qualities.

And there's no question, there are not 4,000 irritants in secondhand smoke, there are 4,000 chemicals in secondhand smoke. But I'm

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not here to quibble about how many of irritants or how many are not. The fact of the matter is that Dr. Stroschein goes in the direction of saying, look, I think this is possible. And in this patient I think it happened, but she's also going to agree that, you know what? It's virtually impossible to determine in someone like Ms. Janoff what caused their chronic sinusitis. And she's going to agree that a whole heck of the times that she treated her she concluded it was bacteria.

Dr. Anderson and Dr. Kronberg are going to take a different view. And they're going to say, you know what, if there's no literature and my patients don't appear to line up like that, then I'm going to conclude that it doesn't cause it.

Think of all the people that are exposed to secondhand smoke. Think of all of them.

Now, would you think out of --

MR. HUNTER: Objection, this is argument.

THE COURT: Sustained.

MR. REILLY: There will be no evidence that in their patient populations of all the people that they see who are exposed to secondhand

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smoke or who have chronic sinusitis that there seems to be any correlation between the two. And that's how they reach their conclusions. That's how Dr. Stroschein reaches her conclusion. Period.

But there's no question that she has allergies and they will all agree that allergies cause chronic sinusitis, period.

Let me wrap this up now by telling you about one or two other things.

Mr. Hunter talked to you about an action plan, 60 million dollars and stuff like that. Listen for any evidence that American Airlines ever did anything in response to anything any cigarette manufacturer ever did.

And while I may not think that an action plan is a good idea, let's look and see what happened to cigarette smoking on board airplanes in 1988 and 1990. What happened to it? It got banned. I don't care how much money Philip Morris spent on anything, what happened? It got banned.

Keep your eye on the target. Control, causation --

MR. HUNTER: Judge, this is argument.

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THE COURT: Sustained.

MR. REILLY: That's what the evidence in this case is going to show. And that really is the story of Ms. Janoff. Thank you very much.

THE COURT: Thank you, Mr. Reilly. Thank you members of the jury. We're going to excuse you for the weekend. You're going to leave your notebooks here with Gary.

We're going to resume on Monday at 10:30 in the morning. Make sure you return here with your badges so they can be seen by any of the witnesses who may be here. Meet outside the courtroom at 10:30. Let me remind you again not to discuss the case in any way and not to have contact with any of the parties and I'll see you promptly at 10:30.

(Jury exits courtroom.)

THE COURT: Other than giving you the ruling on the videotape testimony, are there any other items that we're going to need to address on Monday?

MR. WILLIAMS: I anticipate, judge, a lot of this is open, I didn't want to object, but there's still serious issues concerning admissibility of Dr. Lanson's and Dr. Morgan's

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records. I anticipate they're going to call them because he told them. I still have a lot of objections to the admissibility of the records.

THE COURT: We have never addressed any of the objections and I don't even have any. I agree we're going to need to address that. Do you think an hour will be enough time to cover these issues?

MR. REILLY: Depends how many records they want to cover. But certainly I think we can cover Dr. Lanson's and Dr. Morgan's records. We've taken a records custodian deposition of Dr. Lanson's records. We can provide that to Your Honor. When would you like that?

MR. WILLIAMS: Judge, we can do it when they're going to put their chase in chief, if Your Honor wants to do that on Tuesday or Wednesday, so we get the case moving.

MR. REILLY: Right. I don't think that has to be dealt with to be honest with you.

MR. HUNTER: I agree.

THE COURT: If you'll give me all that information by Monday, I'll take a look at the objections and the records and be prepared to

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argue it on Tuesday night or Monday night or whatever.

MR. REILLY: They're not requiring that I do a records custodian on Dr. Morgan?

MR. WILLIAMS: No, I never objected to authenticity.

MR. REILLY: That means records custodian?

MR. WILLIAMS: Right.

MR. REILLY: Because, and I understand your position on opinions and I'm not, we'll argue that. But in terms of records custodian, are these business records, that's not at issue.

MR. WEINSTEIN: Judge, I have a matter in which you said that you would hear at a later time. It's not important that you make the decision within the next day or two or three of trial days. And that is the issue I brought up originally and you were kind enough to say that it would be an uphill battle and I would listen to it. And that's the fact that I'm asking the Court to take judicial notice of a lot of matters really, but primarily the 3,000 claims that have been filed by nonsmoking flight attendants and that 1,846 of them are claiming chronic sinusitis from tobacco smoke.

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Now, judge, originally the first two trials of course where they weren't claiming, or weren't blaming people. Moreover, I will prove to you not only convincingly that -- I'm not giving you the cases yet, that we are entitled to put that information in and that the Court should take judicial notice of it. And they will admit that there are 1,846 claims of chronic sinusitis. But Mr. Reilly just opened up the door to that. And I'll get his exact statement wherein he suggested or virtually told this jury that there's no one else, you'll find that there's no one else, or words to this effect, that secondhand smoke caused or has been diagnosed, no one else has been diagnosed except for one case with chronic sinusitis from ETS. When in fact, judge, there are 1,846 people who have actually filed claims, airline attendants who have been diagnosed with this from secondhand smoke. And those claims exist.

Moreover, judge, I will give you cases that say that injuries suffered from, at or -- I will give you cases that will show that you can put in prior claims or claims prior and subsequent where people have suffered injuries to prove two

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things, one, notice, but the second thing and is the dangerous character of the particular product or condition.

THE COURT: I suggest that we hear this Monday following the testimony of the jury. After I excuse the jury we can hear this issue.

MR. WEINSTEIN: I'm prepared to argue it at any time, but I feel it's a jury charge.

THE COURT: I'd like to get as many issues out of the way that we can. Be prepared on Monday to argue that issue and to respond to it. If you have anything you want me to read, you can give it to me.

Did you anticipate you're going to give me things to read?

MR. WEINSTEIN: Yes, I have it here, but I'd be pulling it out. Yes, I do have some of the cases here.

THE COURT: If you prefer to have more time to give me materials and for me to read it, we can do this Tuesday night then. We'll do this Tuesday, but get me on Monday so I can review it.

MR. WEINSTEIN: And for the record, it's just my formal filing of asking the Court to

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all my arguments on admissibility.

THE COURT: Do I need to review anything?

MR. KODSI: If you have a document we can argue it Monday morning, I suggest that it's a 1962 document. Dr. Smith, who was questioned about the document, was not an employee of RJ Reynolds in 1962 at the time the document was written. It is a document clearly talking about cigarette smoke and smokers. There is no reference in that document to the secondhand smoke.

THE COURT: Do I have a copy of this document?

MR. KODSI: I didn't bring one because I didn't know Mr. Hunter was going to argue this issue.

THE COURT: I know your office a couple of days ago dropped off a box of records.

MR. KODSI: I think it was an exhibit to the Carr Smith deposition. And in my objections I raised a lack of foundation to the questioning of the document.

THE COURT: Does anybody have a copy of this document? We can make a copy of it if you have one here.

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MR. UPSHAW: Judge, that box was a box of condensed medical records.

MR. HUNTER: Judge, are you going to be in chambers for the next 10 minutes?

THE COURT: Yes.

MR. HUNTER: I'll go over and bring that document to you.

The first page was utilized to examine a witness, but there's, it's a larger document. And we offer either all of it or the first page in evidence. And I'll bring you the whole exhibit within the next 10 minutes.

MR. KODSI: I believe, and I can pull the transcript, when the witness was shown the document the witness had no firsthand knowledge of the document. He was asked to interpret something on the fly.

MR. HUNTER: I know, I'm saying what it is.

MR. KODSI: I understand. So using with the witness was something we objected to and having it in either in evidence. I don't think either the first page.

THE COURT: How much time do you need on Monday.

MR HUNTER: I can make my presentation in

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about eight minutes.

MR. KODSI: And hopefully I can respond to it in two or three.

THE COURT: If I have the group come in here at 10:30, we'll meet here at 10:15.

10:15 we'll argue that issue. Be prepared for it. Anything else that we need to litigate on Monday?

MR. KODSI: Just who is coming Monday now that we're not starting witnesses until Monday?

MR. UPSHAW: Before you gentlemen leave, I do have one more issue which I have to raise. I could raise it on Monday morning if you want to wait.

THE COURT: No, get it out of the way.

MR. UPSHAW: I made some objections during opening statement defense makes a request for mistrial based upon those objections, although the Court sustained the objections on cumulative nature. The basis for mistrial is as follows: Counsel made some comments with regard to a continuation of a plan in litigation. It is improper to make such accusations with regard to litigation by attorneys. You can't -- you can say that a company is doing something outside,

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but what you're saying is a conspiracy to litigate. That's improper to do that in opening statement.

THE COURT: You mean by the company or the lawyer?

MR. UPSHAW: By the lawyer. The lawyers doing certain things, which I objected to and we can go back and get the transcript. You sustained those objections.

THE COURT: Yes, I'd like you to highlight the areas of the transcript. My impression was it was an argument in reference to the companies.

MR. UPSHAW: I'll withhold the rest of my motion, but we will be moving for mistrial based upon those comments.

THE COURT: And I'll hear you on Monday. Also the bailiff told me that the jurors are having a hard time hearing the Plaintiffs. I know you're fairly close to the jury so you want to talk in a conversational way.

MR. HUNTER: They couldn't hear me?

THE BAILIFF: They said Plaintiff.

THE COURT: Have a good weekend, everyone.

(Trial adjourned at 5:30 p.m.)

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